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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

Nos. 82-437 and 82-635

COUNTIES OF MAHNOMEN and CLEARWATER, MINNESOTA, and ELMER H. WINTER, et al.,

Petitioners,

v.

WHITE EARTH BAND OF CHIPPEWA INDIANS; UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

REPLY BRIEF OF THE PETITIONERS

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TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT 1

ARGUMENT. 3

CONCLUSION. 4

TABLE OF AUTHORITIES

Cases:

DeCoteau v. District County Court,
420 U.S. 425 (1975). 3
Mattz v. Arnett, 412 U.S. 481 (1973) 4
Montana v. United States, 440 U.S. 147 (1979). . . . 1
Parklane Hosiery Co., Inc. v. Shore,
439 U.S. 322 (1979). 1, 2
Rosebud Sioux Tribe v. Kneip,
430 U.S. 584 (1977). 3
State v. Clark, 282 N.W.2d 902 (Minn. 1979),
cert. denied, 445 U.S. 904 (1980). 1, 2, 3

Miscellaneous:

1B Moore's Federal Practice, ¶0.416[1] 2

PRELIMINARY STATEMENT

Certain additions to the original statement of facts are necessary in order to clarify matters raised by the Respondents United States and White Earth Band.

The United States places considerable emphasis upon the 1977 agreement of the parties to pursue the boundary issue in state court, and suggests that "all of the parties to the federal proceedings actively participated. . ." in that State court litigation. Brief in Opposition at 3. To the contrary, however, neither the United States nor the Band participated at any stage in the Clark litigation despite its overriding significance. See, e.g., State v. Clark, 282 N.W.2d 902, 903 (Minn. 1979), cert. denied, 445 U.S. 904 (1980) (listing of counsel for parties on whose behalf briefs or argument were made). In these circumstances, the reliance placed on the 1977 agreement by the United States is, in the petitioner's view, troubling. To be sure, mutuality is no longer required for application of collateral estoppel (see, e.g., Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 329-31 (1979)), and there is some question as to whether the United States could have, had it interjected itself into the Clark case, controlled that litigation sufficiently to actuate the principles of estoppel. See, e.g., Montana v. United States, 440 U.S. 147, 155 (1979). Nevertheless, the complete inaction of the United States — and, for that matter, the Tribe — in face of the agreement to turn to the State courts for resolution of the issue is very much akin to the situation in which a plaintiff takes a "wait and see" attitude to related litigation -- a

situation which has been expressly disapproved of by this Court in Parklane Hosiery Co., Inc., supra, 439 U.S. at 329-30.

One other matter bears mention here. The Band appears to suggest that the Defendants below freely turned to the State courts for resolution of the boundary issue. The record shows, however, that was not altogether the situation. What is perhaps most significant in this regard is that there was no understanding or agreement among the parties to defer to the State courts until after the State trial court granted the Defendants' motion to dismiss in the Clark litigation.[1] Indeed, prior to that time, all the parties had indicated to the District Court that the preferred forum for the cases was Federal Court. See, e.g., Transcript of June 23, 1975 Hearing, supra at 23-29. Because the doctrines of collateral estoppel and stare decisis arguably became applicable when the State trial court dismissed the Clark prosecution for want of jurisdiction (see generally 1B Moore's Federal Practice, ¶0.416[1]), the Defendants below were no longer free to ignore the State court proceedings.

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1. Although the State and Counties pled comity in their Answers, counsel for the State and Counties did not actively seek deferral to the State court prior to the State trial court decision. See, e.g., Transcript of June 23, 1975 Hearing at 4-12, 23-29 (the relevant portions of which are appended to the Reply Brief of the Appellee/Cross-Appellant Counties filed in the Court of Appeals below). The individual Intervenor Defendants, Elmer Winter, et al., never sought deferral.

ARGUMENT

The United States argues that the Clark decision is not inconsistent with, and, in fact, relies upon DeCoteau v. District County Court, 420 U.S. 425 (1975) and Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977). Br. in Opposition at 7. This assertion completely ignores the primary thrust of the Petition. The Petitioners do not claim that the change-in-law exception to the doctrine of collateral estoppel is applicable because the Minnesota Supreme Court did not rely on DeCoteau or Rosebud, nor could they since those two cases predate Clark.[2] Instead, the position of the Petitioners is that the Clark decision is predicated, in large part, upon cases espousing an interpretation of the Nelson Act — the surplus lands act at issue — wholly at odds with the interpretation proffered in the more recent case law which includes the lower court decisions in this case. See Pet. at 10-12. And, that the construction given the Nelson Act in the more recent case law is significant in this context goes without question. Although not necessarily dispositive, the conclusion of these cases that the overall purpose of the Nelson Act was to restore lands to the public domain is of obvious significance in

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2. This is not to say, though, that the Petitioners agree that the Clark Court correctly applied the teaching of Rosebud and DeCoteau in resolving the disestablishment issue — they do not. However, whether the Clark case was properly decided on the basis of Rosebud and DeCoteau is not now before this Court.

the disestablishment context. See, e.g., Pet. at 11. See also Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973).

In addition, the United States incorrectly claims that precluding relitigation will not perpetuate inconsistent decision-making. Br. in Opposition at 8. It is certainly true that the cases in this context advise that different conclusions as to disestablishment often result from different factual histories and not from differing interpretations of the law. This counsel is inapplicable here, however, as the differing results are, in large measure, the product of differing interpretations as to the underlying purpose of the very act at issue — the Nelson Act. And, in this regard, no court has counseled that different conclusions as to the baseline purpose of a particular surplus land act is an acceptable result.[3]

CONCLUSION

Wherefore, for the foregoing reasons and the reasons set forth in the Petition and the supporting Amici

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3. The United States also argues that the Cross-Petition in No. 82-635 is not a proper cross-petition, and therefore, was untimely filed. This assertion finds no support in the rules of this Court as there is nothing in Rule 19 — the rule cited by the United States — or any other rule which even suggests that the issues presented in a petition cannot be raised by a respondent in a cross-petition. Indeed, the express language of Rule 19.5 appears to indicate that a respondent may properly cross-petition for review of any issue, whether raised by another party or not.

brief, the Petition for a Writ of Certiorari should be granted.

Dated this 19th day of November, 1982.

Respectfully submitted,

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